No. 02-1348

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

—v.—

RUBINA HUSAIN, ET. AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

ANDREW J. HARAKAS
Counsel of Record
DIANE WESTWOOD WILSON
CONDON & FORSYTH LLP
685 Third Avenue
New York, New York 10017
(212) 490-9100

Counsel for Petitioner
Olympic Airways

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Petitioner OLYMPIC AIRWAYS ("OLYMPIC") respectfully submits this reply to Respondents' Brief in Opposition ("Opp. Brief") to the Petition for writ of certiorari.

ARGUMENT

THE CONFLICT IS LEGALLY, NOT FACTUALLY, BASED

OLYMPIC does not seek to reargue the facts or for the Court to "revisit" *Air France v. Saks*, 470 U.S. 392 (1985). *See* Opp. Brief at 1, 4-7. OLYMPIC seeks the Court's guidance as to whether the decisions of the Third and Eleventh Circuit in *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), or the decision of the Ninth Circuit below, properly apply the legal standards set forth by the Court in *Saks*.

A. The Conflict Among the Circuit Courts Is "Legally" Irreconcilable

Respondents attempt to recast the question presented for review as a factual issue in their effort to deflect the attention of the Court from the clear legal-based conflict created by the decision of the Court of Appeals below, which created a new standard for an "accident" under Article 17 of the Warsaw Convention[1] at odds with *Saks*, *Abramson*, *Krys* and the Warsaw Convention.

OLYMPIC affirmatively stated in the Petition that it does *not* dispute the Findings of Fact of the District Court as adopted by the Court of Appeals (A 3a-9a). *See*

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C.A. § 40105 (1997).

Petition at 4. Thus, respondents' argument that OLYMPIC simply seeks review of factual issues is baseless. *See* Opp. Brief at 4-7. In fact, the recitation of the facts in the Petition mirrors those set forth by the Court of Appeals. *Compare* Petition at 4-6 *with* Decision of the Court of Appeals below, reproduced in the Appendix to the Petition at A 4a-9a.

Similarly, respondents seek to dismiss the conflict of the decision of the Circuit Court below with *Krys* and *Abramson*, by claiming that the conflict is factually based. *See* Opp. Brief at 4-6. The Petition herein, however, presents for review the conflict created by the legal definition of "accident" adopted by the Court of Appeals below. *Krys* and *Abramson* addressed the legal issue of whether an injury/death arising out of a passenger's pre-existing medical condition due to alleged crew negligence during the course of a normal flight can be an Article 17 "accident" and held, no. This is the exact legal issue presented to the Court of Appeals below, which held, yes. The Court should reject respondents' attempt to recast this legal issue into a factual dispute.

The Courts in *Krys* and *Abramson* found that the only correct approach to analyzing the "accident" requirement is to look at the factual events, as opposed to an assertion of crew negligence. Unlike the Third and Eleventh Circuits, the Ninth Court focused its Article 17 "accident" analysis on crew negligence. This analysis is contrary not only to *Abramson* and *Krys*, but also to *Saks*, which clearly stated that the "accident" inquiry is into the nature of the event which caused the injury, and not the care taken by the airline to avert the injury. *Saks*, 470 U.S. at 407 (negligence is relegated to the "all necessary measures" defense under Article 20(1), which is reached only if the Article 17 conditions to liability first are satisfied). *See also El Al Israel Airlines, Ltd. v. Tseng*, 525

U.S. 155 (1999). Accordingly, respondents' argument that all that is required is some "abnormal" crew conduct (Opp. Brief at 9-10) misapprehends *Abramson* and *Krys* and misapplies *Saks* and the Convention.

The Court of Appeals below held:

> The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long *as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane*.

Petition at A 14a (emphasis added).

The holding of the Court below is irreconcilable on its face with Articles 17, 20(1) and 25 of the Convention, *Saks*, *Abramson* and *Krys*. Significantly, respondents ignore the legal conflict created by the decision of the Court below to incorrectly shift the focus of the "accident" (Article 17) inquiry into the care taken by the airline to avert the injury and the carrier's mental state (Articles 20(1) and 25). Rather than attempt to provide a legal rationale for the legal conflict created by the Court below, which injected into Article 17 the alien concepts of the "absence of negligence" and "reasonable alternatives" (Article 20(1)) and "wilful misconduct" (Article 25), respondents attempt to shift the Court's focus to the undisputed facts.

Respondents argue that, unlike *Abramson* and *Krys*, OLYMPIC's conduct "precipitated" and did not "aggravate" the passenger's injury. *See* Opp. Brief at 8. Neither the *Abramson* nor *Krys* legal analysis is based on such a distinction. In fact, the Court below never made such a distinction, nor could it in light of the district court's finding that OLYMPIC should have known that the "fail-

ure to move [Dr. Hanson] would **aggravate** his condition and cause him probable injury" (A 67a), and conclusion that Dr. Hanson's death was caused by "an **exacerbation** of his asthmatic condition due to the prolonged and extensive exposure to second-hand smoke" (A 47a) (emphasis added).[2] Thus, respondents fail to explain how the "accident" standard created by the Court of Appeals below can be reconciled with *Saks*, *Krys* and *Abramson* —the claimed factual distinctions (not even so distinct with respect to the *Abramson* case) do not overcome the conflicting legal standards.

B. The Court Should Make Clear that the Legal Issue of What Constitutes an Article 17 "Accident" Has Not Been Changed by Tseng

Contrary to respondents' argument (Opp. Brief at 12-13), a faithful reading of the decisions issued following *Tseng* reflects that the lowers courts have in fact redefined "accident." Before *Tseng*, courts interpreted an "accident" *not* to include an injury due to a passenger's pre-existing medical condition even if there were allegations of crew negligence. *See Krys*, 119 F.3d at 1521-22; *Abramson*, 739 F.2d at 132-33; *Rajcoorar v. Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996); *Fischer v. Northwest Airlines*, 623 F. Supp. 1064, 1065 (N.D. Ill. 1985). After *Tseng*, courts improperly have adopted the opposite interpretation of "accident." *See* Decision of the district court below (A 58 n.111); *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, 1084 (N.D. Ill. 2002); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 666 (S.D.N.Y. 2001);

[2] In any event, the courts below both found that Dr. Hanson was struggling from his asthmatic condition during the layover in Athens, well before he boarded the OLYMPIC flight. A 6a; A 37a, 45a.

McCaskey v. Continental Airlines, Inc., 159 F. Supp. 2d 562, 573 (S.D. Tex. 2001). To the extent that the lower courts are tampering with the legal question of what constitutes an Article 17 "accident" to avoid the Convention's preemption of state law-based causes of action, the courts, including the Court below, are issuing incorrect decisions that are contrary to the Warsaw Convention and in conflict with Supreme Court precedent. The term "accident" did not have one meaning before *Tseng*, and another meaning after *Tseng*.

CONCLUSION

The Petition for Writ of Certiorari should be granted in all respects.

Dated: April 23, 2003

Respectfully submitted,

ANDREW J. HARAKAS
Counsel of Record
DIANE WESTWOOD WILSON
CONDON & FORSYTH LLP
685 Third Avenue, 14th Floor
New York, New York 10017
(212) 490-9100

Attorney for Petitioner
Olympic Airways

Of Counsel:

JOHN MAGGIO